Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-1546

NO. _____

ADOLIO LAZARO CRUZ,
CHARLES VICTOR McCUTCHEON,
DAVID KRIS SANDLIN
AND
JAMES VINCENT FEENEY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on March 3, 1977.

OPINION BELOW

The opinion of the Court of Appeals is printed in Appendix A of this petition. It has not yet been reported and will not be.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether an individual charged with possession and conspiracy to possess with intent to distribute marijuana has standing to object to the introduction of such contraband found in premises where he was present, but over which premises he exercises no ownership, interest or control.

CONSTITUTIONAL PROVISION

The constitutional provision involved is Amendment IV to the Constitution of the United States. It provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Appellants were indicted in 75-C-63 in two counts for (1) conspiracy to possess with intent to distribute marijuana in violation of Title 21, U.S.C. Section 841(a)(1), and (2) possession with intent to distribute marijuana, a violation of Title 21, U.S.C., Section 841(a)(1).

A Motion for Judgment of Acquittal was made on behalf of Appellants based upon an insufficiency of the evidence to present a jury issue. Such Motion was made after the government rested and prior to presentation of appellants' case, and was urged again at the close of appellants' case. The Trial Court denied the motion. The jury returned a verdict of guilty as to all appellants on both counts.

Appellant Adolio Lazaro Cruz was sentenced to three (3) years with a Special Parole Term of two (2) years as to counts 1 and 2 of the indictment, said sentence to run concurrently. Appellant Charles Victor McCutcheon was sentenced to five (5) years with a Special Parole Term of three (3) years as to counts 1 and 2, said sentence to run concurrently. Appellant James Vincent Feeney was sentenced to five (5) years with a Special Parole Term of three (3) years, said sentence to run concurrently. Appellant David Kris Sandlin was sentenced to five (5) years with a Special Parole Term of three (3) years as to Counts 1 and 2, said sentence to run concurrently.

At approximately 6:40 A.M. on March 27, 1975, government agents took up surveillance of a house located at 5422 Old Brownsville Road, Corpus Christi, Texas. Surveillance was maintained from 6:40 P.M. until approximately 10:10 P.M. at which time a search warrant was served on Oscar Salazar Guerra, the owner or person in control of the property.

Three vehicles were observed entering the area during the surveillance and the same vehicles left the area prior to the serving of the search warrant. While some movement of people was seen during the surveillance, no one

was identified moving, loading, unloading, weighing or working with the marijuana. As the government agents drove into the area in three vehicles at approximately 10:10 P.M., a co-defendant, not one of the appellants herein, was honking the horn in a car near the house.

Six agents alighted from the government vehicles, proceeding to apprehend eight individuals present at the property. Appellants Cruz, Feeney and Sandlin were arrested in the garage. Appellant McCutcheon was arrested in the house. Marijuana was found in the garage area and in a locked filing cabinet in the house. Marijuana sweepings were found on a desk located in the house.

At no time was any one of appellants seen in actual possession of any of the contraband. There was no testimony that any of the appellants carried, loaded, unloaded, sold, bought, discussed buying or selling, or in any way exercised control, dominion or custody over any of the contraband.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The trial court committed reversible error in overruling appellants' objection to the introduction of the contraband.

Counsel for appellants duly and timely objected to the introduction into evidence of the contraband for which appellants were charged with possession and conspiracy to possess with intent to distribute. The trial court erroneously overruled said objection.

Appellants have standing to challenge validity of the search and seizure of the contraband found at 5422 Old Brownsville Road. When a defendant is indicted for pos-

session or conspiracy to possess contraband found as the result of a search of a place where he is present, he has standing to challenge the validity of such search even though he does not own the property searched or the seized contraband. *Jones v. United States*, 362 U.S. 309, 80 S.Ct. 725 (1960).

> "[T]o hold to the contrary, that is to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time . . . It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." *Jones v. United States*, supra, at p. 263, p. 732.

In the case at bar appellants were present at 5422 Old Brownsville Road at the time of the search which located the contraband. They were all arrested at the scene of the search. At no time did any of them claim ownership or possession of the premises searched or the contraband. However, each appellant was indicted in 75-C-63 in count one of conspiracy with intent to distribute the seized contraband and in count two with possession of said contraband. Therefore, under the rule of *Jones v. United States*, appellants have proper standing to challenge the validity of the search.

The Fifth Circuit recently recognized this principal in *United States v. Scheffer*, 463 F.2d 567 (C.A. 5th Cir.

1972). A warrantless search of a house owned by Scheffer was held to be illegal. A co-defendant named Collins was present in the house at the time of the search. "We also hold, on the strength of *Jones v. United States*, supra, that Collins has standing for the reason that he was a guest and a lawful occupant in Scheffer's house."

The premises searched, 5422 Old Brownsville Road, was a private dwelling. "It is, of course, an elementary constitutional principle that police officers must go before a neutral government official and obtain a search warrant before intruding into a private dwelling." *United States v. Scheffer*, supra.

Although government witnesses testified repeatedly to a search warrant which was served on the defendant Oscar Salazar Guerra, at no time was such instrument brought before the court or introduced into evidence. Furthermore, there was no testimony explaining the absence of the search warrant. In *Hagen v. United States*, 5 F.2d 965 (C.A. 8th Cir. 1925) when "neither this warrant, nor a copy, served at the time of arrest, nor the affidavit upon which it issued was produced," the court held that it was insufficient.

The Fifth Circuit in *United States v. Woodall*, 438 F.2d 1317 (C.A. 5th Cir. 1970), recently affirmed the principle at the root of *Hagen v. United States*, supra, that where a party conceals evidence, "the settled law of this circuit permits an inference to be drawn that the testimony so concealed would be unfavorable to the person who sequesters it." at p. 1327. Although the government had the search warrant and affidavit upon which it issued, it failed to offer it into evidence, thus

concealing it from the court. Therefore, an inference of invalidity arises as to the search warrant.

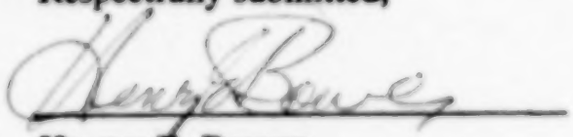
Furthermore, in order to introduce contraband into evidence, a legal predicate must be laid showing it to be properly admissible. "In jurisdictions where evidence obtained as a result of an illegal search is incompetent against accused, it has been held that to render admissible evidence obtained by a search a legal foundation must be laid." 22A C.J.S., Criminal Law Section 657(20). It is clear that the federal courts follow the rule that evidence obtained as the result of an illegal search must be excluded from the trial. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968), at p. 969, 974.

Since no search warrant was introduced into evidence, nor its absence from evidence explained, and no testimony showing any justification for a warrantless search presented, a proper predicate was not laid for the introduction of the contraband into evidence. Thus, the trial court reversibly erred in overruling appellants' objection to the introduction of said contraband into evidence.

CONCLUSION

For the reasons given above, a Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4360

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, JAMES VINCENT FEENEY, RAYMOND RIVERA, AND MANUEL SILGUERO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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(March 3, 1977)

BEFORE GOLDBERG, CLARK and FAY,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4360

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, JAMES VINCENT FEENEY, RAYMOND RIVERA, AND MANUEL SILGUERO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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(March 3, 1977)

BEFORE GOLDBERG, CLARK and FAY,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Issued as Mandate: March 25, 1977

(AS TO ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, JAMES VINCENT FEENEY and MANUEL SILGUERO ONLY)

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.